

SECURITIES AND CAPITAL MARKETS

SEC ADOPTS DODD-FRANK HEDGING DISCLOSURE RULES

Authors: Alexander R. McClean and Kevin R. Pregent

During December 2018, the Securities and Exchange Commission (“SEC”) adopted a final rule requiring companies to disclose their practices or policies regarding the ability of their directors, officers, and employees to engage in transactions that hedge or offset any decrease in the market value of equity securities granted as compensation (“Hedging Disclosure” or “Disclosure”). The Hedging Disclosure was mandated by Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and will require additional disclosures in proxy and information statements beginning no earlier than the second half of 2019.

Information Required in the Hedging Disclosure

The Hedging Disclosure rule will become Item 407(i) of Regulation S-K. Under the Hedging Disclosure, companies will now have to describe “any practices or policies it has adopted (whether written or not)” relating to the ability of all employees, including directors and officers, to engage in transactions that hedge or offset, or are designed to perform as such, any decrease in the market value of equity securities granted as compensation.

Companies will not be required to adopt hedging policies but, if a company does not have such a policy, the company will be required to disclose the absence of such a policy and “state that hedging transactions are generally permitted.”

For companies that do have hedging policies, the Hedging Disclosure must consist of either (i) a fair and accurate summary of the policies, including the categories of persons covered and any categories of hedging transactions that are specifically permitted or disallowed, or (ii) a full disclosure of the practices or policies.

Where and When Companies Must Provide the Hedging Disclosure

Companies will be required to provide the Hedging Disclosure in their proxy and information statements. Companies that are required to provide a Compensation Discussion & Analysis (“CD&A”) may include the Hedging Disclosure in the CD&A or the Hedging Disclosure may be included elsewhere in the proxy or information statement if a cross-reference to the Disclosure is included in the CD&A.

For companies that do not qualify as either smaller reporting companies or emerging growth companies, the Hedging Disclosure takes effect for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019.

For companies that do qualify as either smaller reporting companies or emerging growth companies, the Hedging Disclosure takes effect for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2020.

What to Do Now

Companies should review their existing hedging policy to determine if any updates are needed before they will disclose any such policy in their future SEC filings. If a company does not currently have a policy regarding hedging, it may want to consider adopting such a policy or understand the potential consequences of disclosing the lack of a hedging policy. Companies should also keep in mind other recent developments that will effect shareholder meetings in 2019, which we summarized in a prior LEGALcurrents®, [Preparing for the 2019 Proxy Season](#).

If you would like more information on the SEC's new Hedging Disclosure rule, which can be found at [this link](#), or the 2019 proxy season, please contact a member of Harter Secrest & Emery LLP's [Securities and Capital Markets](#) Group at 585.232.6500 or visit www.hselaw.com.

Alexander R. McClean, 585.231.1248, amcclean@hselaw.com

Kevin R. Pregent, 585.231.1307, kpregent@hselaw.com

Attorney Advertising. Prior results do not guarantee a similar outcome. This publication is provided as a service to clients and friends of Harter Secrest & Emery LLP. It is intended for general information purposes only and should not be considered as legal advice. The contents are neither an exhaustive discussion nor do they purport to cover all developments in the area. The reader should consult with legal counsel to determine how applicable laws relate to specific situations. © 2019 Harter Secrest & Emery LLP

